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PRESIDENT TRUMP’S CONTRACTS FOR SILENCE

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INTRODUCTION

In August 2018, the American public became privy to the President's use of an extensive system of nondisclosure agreements (NDAs) and nondisparagement clauses to prevent campaign staff and White House employees from betraying his confidence, leaking information to the press, or besmirching—in any way—his administration or family.¹ These contracts for silence² were particularly restrictive, even for a man with a fondness for management-friendly employment agreements³ and a penchant for “information

¹ For a representative NDA with the Trump campaign, see *Read: 2016 Trump Campaign Nondisclosure Agreement*, CNN (Aug. 14, 2018, 4:37 PM), <https://www.cnn.com/2018/08/14/politics/trump-campaign-nda-omarosa/index.html> [<https://perma.cc/K2XL-8JGB>]. For a representative NDA with a White House official, see Ruth Marcus, *Trump Had Senior Staff Sign Nondisclosure Agreements. They're Supposed to Last Beyond His Presidency*, WASH. POST (Mar. 18, 2018, 3:56 PM), https://www.washingtonpost.com/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79df3d931db7f68_story.html?utm_term=.7c03cf0d8ee4 [<https://perma.cc/4KKH-W5QH>].

² Here, I depart from the “contracts of silence” phrasing used most prominently by Arthur Garfield in his landmark article on secrecy in contract law. See Arthur Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 268 n.17 (1997). I do so to underscore the purpose of these agreements—to chill or outright silence speech—and to achieve that end through restrictive, sometimes absurdly large penalties. This Comment is also distinguishable in that I devote more time to grappling with, and potentially resolving, First Amendment arguments against enforcing contracts for silence. Nevertheless, I cite to Garfield's work throughout this Comment as a precursor to my analysis.

³ News accounts chronicling President Trump's extensive use of NDAs and other contracts for silence are legion. See, e.g., David A. Graham, *Donald Trump's Long History of Paying for Silence*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/01/donald-trumps-long-history-with-hush-money/550745/> [<https://perma.cc/4WDK-73ZN>] (“At various times in the past, Donald Trump has struck deals with women in his life, or formerly in his life, exchanging money for silence.”). This includes former employees. See, e.g., Julianna Goldman & Laura Strickler, *Trump Organization Employees Must Agree to Keep Info About Trump Family Secret*, CBS EVENING NEWS (July 27, 2017, 7:20 PM), <https://www.cbsnews.com/news/trump-organization-new-confidentiality-agreement-employees-family-secret/> [<https://perma.cc/W9LB-P7E2>] (describing the widespread use of NDAs within the Trump Organization, President Trump's family company). He has also used contracts for silence to control media exposure surrounding past marriages. See, e.g., *Trump v. Trump*, 582 N.Y.S.2d 1008, 1008–09 (App. Div. 1992) (enforcing a nondisclosure agreement against now-President Trump's first wife, Ivana). Importantly for my purposes, this penchant for NDAs led President Trump to require presidential campaign and transition period staffers—in addition to current White House employees—to sign contracts for silence. See Scott Horsley, *Sworn to Secrecy: Trump's History of Using Nondisclosure Agreements*, NPR (Mar. 19, 2018, 6:29 PM), <https://www.npr.org/2018/03/19/595025070/sworn-to-secrecy-trumps-history-of-using-nondisclosure-agreements> [<https://perma.cc/CV>].

mischievous.”⁴ For instance, not only did his campaign NDA apply to *any* piece of information then-candidate Trump deemed covered, it also stated that campaign employees’ obligation existed in perpetuity.⁵ A draft of the NDA he imposed on White House staff, meanwhile, stipulated a \$10 million penalty for each breach.⁶

Of course, wrongdoers have long used contractual spurs to silence their accusers in a variety of contexts—from industrial accidents in the 1990s⁷ to clergy sex abuse scandals;⁸ from the #MeToo movement⁹ to Silicon Valley titans with their armies of independent contractors.¹⁰ Only recently, however, have pundits, legal scholars, and activists alike begun considering the legality of these contracts for silence in the context of state actors—and most notably those involving the 45th President of the United States.¹¹

N8-D58B]. In sum, “President Trump seems . . . to have raised contractually enforced silence to an art form.” Burt Neuborne, *Limiting the Right to Buy Silence; A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 425 (2019).

⁴ As Nathan Cortez describes in a recent article,

[T]he Trump administration has adopted a variety of mischievous information policies . . . many unrelated to each other, that together signal a shift away from open government . . . towards more cynical uses of government information. Examples include removing certain data from the public domain, manipulating data, censoring scientists at various federal departments, scrubbing certain terms and topics from federal web sites, and using transparency initiatives as a pretext to undermine sound science.

Nathan Cortez, *Information Mischievous Under the Trump Administration*, 94 CHI.-KENT L. REV. 315, 315–16 (2019).

⁵ *Read: 2016 Trump Campaign Nondisclosure Agreement*, *supra* note 1.

⁶ *Id.*; Marcus, *supra* note 1.

⁷ Barry Siegel, *Dilemmas of Settling in Secret: Companies Offer Hefty Sums in Exchange for Keeping the Details of Public-Hazard Lawsuits Quiet. Plaintiffs Must Choose Their Own Interest or the Public Good*, L.A. TIMES (Apr. 5, 1991), http://articles.latimes.com/1991-04-05/news/mn-1990_1_public-interest [<https://perma.cc/FA8D-2LD5>].

⁸ Adam Liptak, *Price of Broken Vows of Silence*, N.Y. TIMES (May 26, 2002), <https://www.nytimes.com/2002/05/26/us/price-of-broken-vows-of-silence.html> [<https://perma.cc/P5FY-8RTH>].

⁹ Matthews Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [<https://perma.cc/BCE6-5A2B>].

¹⁰ Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html> [<https://perma.cc/9T42-G65Y>].

¹¹ This is as good a time as ever to disclaim that this Comment only contemplates contracts for silence entered into by federal officials, not state or local government actors. I will not devote any time to exploring the use of similar agreements by cities and municipalities in settlements they reach with private citizens. Whether and how these officials ought to be able to chill citizen speech is a topic for a different paper.

Historically, courts have been extremely deferential to government entities that restrict employees' speech when the integrity of sensitive data is at stake.¹² Debate is therefore liveliest around whether and when government actors can quell public employees' disclosures of nonclassified information learned on the job.¹³

But the question of how to treat government contracts for silence extends far beyond the Beltway's bipartisan cottage industry of political "tell-alls".¹⁴ For instance, contracts for silence potentially implicate questions of federal labor law and may be in tension with federal statutes put in place to protect government whistleblowers. Moreover, contracts for silence are fraught with political accountability concerns. Imagine, for example, the uniquely corrosive effect of an elected official enforcing a contract for silence against a former employee and current constituent.

To be sure, many share a common-sense intuition that the government should not be able to unduly infringe upon individual citizens' abilities to engage

¹² See, e.g., *Am. Foreign Serv. Ass'n v. Garfunkel*, 490 U.S. 153 (1989) (allowing the government to protect classified information through contractual relationships with federal employees privy to sensitive information). Courts have also held that the government cannot restrict former employees from disclosing unclassified information in written form (i.e. in "tell-all" memoirs). *McGhee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972).

¹³ See, e.g., Esha Bhandari, *No, the President Can't Legally Gag White House Staffers*, ACLU (Mar. 20, 2018, 1:00 PM), <https://www.aclu.org/blog/free-speech/employee-speech-and-whistleblowers/no-president-cant-legally-gag-white-house> [<https://perma.cc/VT26-4WER>] (discussing how the Trump Administration's broad use of nondisclosure agreements should be held unenforceable because "the First Amendment protects federal employees' right to speak in a private capacity about matters of public concern—and certainly the functioning of a presidential administration raises many issues that are of public concern").

¹⁴ See Douglas Martin, *W. Marvin Watson, Johnson's Unofficial Chief of Staff, Dies at 93*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/obituaries/w-marvin-watson-johnsons-unofficial-chief-of-staff-dies-at-93.html> [<https://perma.cc/ZDM5-4CBD>] (contextualizing Watson's memoir on the Johnson Administration); see also Concepción De León, *Is Everyone in Politics Writing a Tell-All? Yes*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/books/review/political-books-announced.html> [<https://perma.cc/WST2-UMND>] (providing an overview of then-forthcoming political memoirs recounting life in the Obama Administration and during the 2016 presidential election campaign); David Klinghoffer, *A Speechifier in Her Own Write: What I Saw at the Revolution: A Political Life in the Reagan Era by Peggy Noonan*, L.A. TIMES (Feb. 4, 1990), http://articles.latimes.com/1990-02-04/books/bk-87_1_peggy-noonan [<https://perma.cc/Y3CD-D5ZY>] (discussing the memoir of a controversial Reagan-era speechwriter); Morton Knodracke, *How to Lose Friends and Influence*, N.Y. TIMES (May 29, 1988), <https://www.nytimes.com/1988/05/29/books/how-to-lose-friends-and-influence.html> [<https://perma.cc/5JFC-DDBT>] (reviewing a fiery memoir penned by President Reagan's former chief of staff).

in public debate.¹⁵ An editor at *The Washington Post* has gone so far as to deem the current administration's runaway use of contracts for silence "constitutionally repugnant."¹⁶ But, as far as I can tell, none of these hit pieces have carefully catalogued the legal arguments available to two categories of potential plaintiffs: (1) current or former Trump Administration officials facing lawsuits for sharing nonclassified information in violation of their NDAs; as well as (2) former private sector or campaign staff of then-candidate Trump who face lawsuits from the President for allegedly violating contracts for silence they entered into before he became Chief Executive.

This Comment takes up this challenge. Rather than articulating and defending a singular argument against the use of contracts for silence by state actors, it suggests a menu of approaches—ranging from the conventional to the more creative—for challenging these agreements. Taking my cue from the pleadings of former executive branch and campaign staffers challenging Trump's NDAs and nondisparagement clauses, this Comment explores both contract law and First Amendment grounds for dismantling contracts for silence by state actors.¹⁷

In Part I, I describe the fundamental changes to contract law and the practice of contracting which provide the backdrop for my discussions of contracts for silence. In Part II, I provide the contract law argument for invalidating contracts for silence by state actors, and in Part III, I provide its foil: the First Amendment argument for declaring such agreements unenforceable. I end each Part by contextualizing contracts for silence within broader discussions around the value of transparency, public access, and the importance of democratic self-governance.

Of course, both forks of this analysis deserve more extensive treatment; this Comment seeks only to make future efforts more effective and complete by outlining at least some of the potential paths forward. My hope is that, in doing so, I provide scaffolding for the arguments of future

¹⁵ Alison Frankel, *Trump NDAs Can't Silence Ex-White House Officials: Legal Experts*, REUTERS (Mar. 19, 2018, 5:24 PM), <https://www.reuters.com/article/us-otc-nda/trump-ndas-cant-silence-ex-white-house-officials-legal-experts-idUSKBN1GV2UT> [<https://perma.cc/4S55-2WPJ>]; Jessica Levinson, *Can Trump Use NDAs to Prevent White House Staffers Like Omarosa from Criticizing Him?*, NBC (Aug. 14, 2018, 4:49 PM), <https://www.nbcnews.com/think/opinion/can-trump-use-ndas-stop-white-house-staffers-omarosa-criticizing-ncna900706> [<https://perma.cc/343A-FAVC>]; Bradley P. Moss, *Why the White House Can't Stop Omarosa Manigault-Newman from Talking*, LAWFARE (Aug. 14, 2018, 12:19 PM), <https://www.lawfareblog.com/why-white-house-cant-stop-omarosa-manigault-newman-talking> [<https://perma.cc/DHC3-73A2>].

¹⁶ Marcus, *supra* note 1.

¹⁷ See, e.g., Complaint at 3–5, *Sims v. Trump*, No. 1:19-cv-00345 (D.D.C. Feb. 11, 2019) (advancing First Amendment arguments against the enforcement of an NDA against former Trump communications adviser Cliff Sims).

advocates who share in the belief that “the censorial power is in the people over the Government, and not in the Government over the people.”¹⁸

I. CONTRACTS FOR SILENCE IN CONTEXT

The nature of contract law is changing. More and more contracts¹⁹ take the form of standard-form, boilerplate agreements which no one reads and which no one sues upon.²⁰ Plus, contracting seldom takes the form of boisterous, extensive negotiations; more often than not, the employment and consumer agreements most people interact with on a daily basis are not bargained for.²¹ This raises concerns for those of us interested in what contract law has to say about the enforceability of contracts for silence. To understand the stakes of this discussion, I will first explain several contract law topics which bear on the issue I have identified, and which set the stage for both the contract law and First Amendment arguments against state-actor enforcement of contracts for silence against individuals: (1) the privatization of litigation; (2) the explosion of arbitration as a form of Alternate Dispute Resolution (ADR) in recent years; and (3) the ongoing battle to protect whistleblowers as potentially in tension with the underlying purpose of contracts for silence.

First, “litigation” is increasingly a private affair—conducted in conference rooms before arbiters or rendered unnecessary by parties motivated to settle early, which explains why, “even as filings have increased, the percentages of cases going to trial (and the absolute number

¹⁸ *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964) (citing 4 ANNALS OF CONG. 934 (1794)).

¹⁹ For the purposes of this Comment, I refer to settlements as falling under the larger umbrella of contracts since “American law treats the settlement agreement as a member of the larger family of private contracts.” Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 9 (1996); see also Edward L. Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478, 513 (1981) (“Settlements, even when reached during a trial, are regarded as private contracts and interpreted according to contract rules.”).

²⁰ See generally Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 120 (2017) (questioning the value of boilerplate language in a world where almost “no one reads their form contracts”).

²¹ See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2014) (charting the rise of standard-form contracts containing boilerplate language and explaining the ways boilerplate contracts disempower individual consumers or signatories and potentially undermine democratic norms). What’s more, standard form agreements have become normalized not only in conventional consumer agreements but even in business dealings among substantially more sophisticated parties. See Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1034 (2006) (“Notwithstanding their representation by able counsel, charged to craft comprehensive and detailed, but also particularized, contracts, such parties will commonly conclude agreements comprised heavily of traditional terms—contracting norms of a sort—rather than terms tailored to the distinct features of their particular bargain.”).

of trials) have declined.”²² That the public is less able or unable to monitor these proceedings or to read about their resolution *ex post* poses potential harms to our democratic order (e.g. “how can justice in secret ever be just?”).²³ And while the trend towards more ADR and fewer public trials shows no sign of abating, policymakers and judges do have the tools to intervene and mitigate transparency concerns.²⁴ Some would have them pick up those tools and act quickly to defend the preeminence of public trials and oppose the normalization of pretrial settlements as violative of our democratic norms of publicity and public access.²⁵

Second, the ubiquity of mandatory arbitration clauses has similarly prevented evidence of disputes from becoming public, even after resolution.²⁶ These clauses require that parties to a contract bring any claims to private arbitrators rather than in open court; they also sometimes include prohibitions on class action suits.²⁷ Researchers “estimat[e] that

²² Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 773–74 (2008).

²³ See *id.* at 804 (“Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.”).

²⁴ As Resnik explains,

[E]ven as judges and other dispute resolution providers move away from trials and focus on pretrial management and dispute resolution in chambers and conference rooms, it is possible to build in a place for the public (‘sunshine,’ to borrow the term legislators have used) or to wall off proceedings from the public.

Id. at 809.

²⁵ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“I do not believe that settlement as a generic practice is preferable to judgement or should be institutionalized on a wholesale and indiscriminate basis Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”). A decade after Fiss’s landmark—and controversial—piece, David Luban revisited *Against Settlement* but left intact much of its underlying foundation. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) (arguing that instead of being “for or against settlement,” judges should only approve settlements when doing so serves judicial efficiency as well as societal interests in “openness, legal justice, and the creation of public goods”); cf. Arthur R. Miller, *Confidentiality, Protective Orders, and the Public Access to the Courts*, 105 HARV. L. REV. 428, 431 (1991) (“If public access assumes an importance on a par with the [judicial] system’s concern for resolving disputes among the litigants, the traditional balance would be upset and the courts diverted from their primary mission.”).

²⁶ See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (explaining the impacts of this privatization—ranging from the slower pace at which judges are now producing law to the power citizens are collectively ceding to arbitration groups at the expense of courts).

²⁷ For a general overview of mandatory arbitration clauses, which *The New York Times* has described as part “of a far-reaching power play orchestrated by American corporations,” see Jessica Silver-Greenberg & Robert Gebeloff, *Beware the Fine Print: Part I: Arbitration*

roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”²⁸ Plus, many major service providers also require their customers to consent to mandatory arbitration provisions as a condition of their consumer agreements.²⁹ By severely restricting the ways consumers and workers seek judicial relief for wrongs they have suffered, the movement towards mandatory arbitration clauses is increasingly “disarm[ing]” individuals seeking justice³⁰ and providing procedural leverage to large, sophisticated corporate parties.³¹ The Supreme Court has proven an engaged partner in this movement, too—taking every opportunity to expand the prevalence of mandatory arbitration clauses and rejecting, several times, the argument that mandatory arbitration conceals important information from public view.³²

Third, policymakers are only just beginning to grapple with the implications of these foundational changes to contract law—as well as the growing frequency of NDAs and nondisparagement clauses—on whistleblower statutes. Historically, these laws have protected employees who come forward to regulators and elected officials to report wrongdoing, either in corporate America or within the federal government.³³ In response to the ubiquity of NDAs, nondisparagement

Everywhere, Stacking the Deck of Justice, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/RC3G-9QTS>].

²⁸ Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1303, 1310 (2015).

²⁹ These industries include credit cards, cell phone providers, cable and internet providers, and banks—among others. PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009), <https://www.citizen.org/wp-content/uploads/unfairandeverywhere.pdf> [<https://perma.cc/8NLF-5TVB>].

³⁰ Sternlight, *supra* note 28, at 1310.

³¹ After all, more often than not control over procedure is as important—if not more important—than control over substance. *See, e.g., id.* at 1309 (“I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time” (citing *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell))).

³² *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (upholding an arbitration clause preventing an employee class-action despite the clause’s apparent tension with employees’ rights to “concerted activity” under the NLRA); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (holding that an arbitration clause would not be rendered unenforceable merely because the cost of pursuing arbitration exceeded the amount available in recovery).

³³ *See, e.g., The Whistleblower Protection Program*, U.S. DEP’T OF LABOR, <https://www.whistleblowers.gov/> [<https://perma.cc/6LVZ-AFZ4>] (last visited Mar. 12, 2020) (providing resources to employees on their rights under federal whistleblower statutes as well as a brief overview of whistleblower protections).

provisions, and other contracts for silence, Congress saw fit in 2012 to pass the Whistleblower Protection Enhancement Act (WPEA), which prohibits agencies from enforcing “any nondisclosure policy, form, or agreement” that did not specifically include a savings clause ensuring continuity of whistleblower protections. In theory, the WPEA was a win for whistleblower advocates on the Hill.³⁴ It reinforced federal whistleblower protections in an age of speech-restrictive, standard-form contracts and signaled to the rank-and-file of the federal workforce that their right to come forward with evidence of fraud and abuse remained protected. We have reason to worry about compliance with the WPEA, though. Inspectors General within the Trump Administration, including at both the Department of Homeland Security and General Services Administration, have identified instances of agency shortcomings under the WPEA.³⁵ Plus, not all information that the public might have an interest in hearing would be covered under even the most stringent whistleblower law. While the exact consequences of these shifts in the nature of contract law have yet to be seen, the changes to the very nature

³⁴ A perhaps unexpected ally of federal whistleblowers on the Hill—and co-author of the WPEA—has been Senator Chuck Grassley, former Chairman of the Senate Judiciary Committee. See Ben Kostyack, *Senator Grassley Reminds FBI Agents of Their Whistleblower Rights*, NAT’L WHISTLEBLOWER LEGAL DEF. & EDUC. FUND (May 25, 2018), <https://www.whistleblowersblog.org/2018/05/articles/government-whistleblowers/senator-grassley-reminds-fbi-agents-of-their-whistleblower-rights/> [https://perma.cc/NZQ4-PECL]. In a 2018 speech delivered on National Whistleblower Appreciation Day, Senator Grassley extolled the virtues of whistleblowers—reminding his audience of the time-honored tradition of whistleblower protections dating back to the American Revolution and emphasizing that whistleblowers consistently prevent fraud more effectively than relying solely on the government to self-regulate. See Senator Chuck Grassley, *Speech on National Whistleblower Appreciation Day* (July 30, 2018), <https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude> [https://perma.cc/T7BC-GLDT]. Apart from Senator Grassley, congressional action in defense of whistleblowers has been limited to a stalled legislative proposal offering protection to federal whistleblowers who come forward in spite of NDAs. No Disrupting Accountability (NDA) Act, H.R. 1484, 116th Cong. (2019). The late Rep. Elijah Cummings also issued a threat to withhold pay from “White House officials who enforce nondisclosure agreements that lack protections for federal whistleblowers.” Cristina Marcos, *Cummings Threatens Salaries of Trump Officials Who Enforce Nondisclosure Agreements*, HILL (May 14, 2019, 12:59 PM), <https://thehill.com/homenews/house/443616-cummings-threatens-salaries-of-trump-officials-who-enforce-nondisclosure> [https://perma.cc/9LS5-DXAK].

³⁵ See Joe Davidson, *Trump Likes Nondisclosure Agreements, but Should Federal Agencies Use Secrecy Pacts?*, WASH. POST (Aug. 21, 2018), https://www.washingtonpost.com/politics/2018/08/21/trump-likes-nondisclosure-agreements-should-federal-agencies-use-secrecy-pacts/?utm_term=.3f433d5e4d51 [https://perma.cc/TV3N-LFL7] (describing the failure of the DHS to include a required statement in all NDAs regarding the employee’s rights and obligations concerning certain disclosures).

of our legal agreements (including their forums and formats) are important. While the following Parts touch on the topics raised here, they do not propose resolutions to these ongoing debates; instead, they focus on potential paths through the uncertain thicket that is the future of contract law.

II. THE CONTRACT LAW ARGUMENT

Invalidating contracts for silence necessarily undermines the time-honored tradition of respecting contracting parties' wishes, opening up a variety of doctrinal unknowns.³⁶ Indeed, freedom of contract is a foundational, though not unquestioned, element of American law.³⁷ To be sure, courts have had no problem overriding parties' wishes when substantial societal interests are at risk. For example, contracts for silence which suppress evidence³⁸ or conceal crimes³⁹ are routinely invalidated. Courts have also struck down particularly restrictive contracts for silence when they violate the terms of statutes⁴⁰ or where courts have expressed and consistently applied public policies against particular contractual practices.⁴¹ At the most basic level,

³⁶ See M.P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 293 (1966) ("One of the most interesting unresolved points is the extent to which one can sell one's silence.").

³⁷ *Morehead v. New York*, 298 U.S. 587, 610-11 (1936) ("[F]reedom of contract is the general rule and restraint the exception."); cf. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-93 (1937) (holding that freedom of contract is not an absolute right and may be restricted when in the public interest).

³⁸ RESTATEMENT (FIRST) OF CONTRACTS § 554 (AM. LAW INST. 1932). The First Restatement takes a harder line than the Second Restatement, which turned away from articulating specific grounds for unenforceability and established a balancing test for finding contracts potentially unenforceable on public policy grounds. Compare *id.* ("A bargain that has for its object or consideration the suppression of evidence by inducing witnesses to leave the State, by the destruction of documents, or otherwise, is illegal."), with RESTATEMENT (SECOND) OF CONTRACTS §178 (AM. LAW INST. 1981) (laying out factors which weigh in favor and against enforcement of a contract term).

³⁹ RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 39, §548; see also Garfield, *supra* note 2, at 306-12 (explaining the application of the Second Restatement's balancing test in the context of contracts to conceal crimes).

⁴⁰ See, e.g., *Hobson Bearing Int'l*, 365 N.L.R.B. 73 (2017) (invalidating relevant portions of a confidentiality agreement that violated the National Labor Relations Act's protections for workers, including by "prohibiting employees from discussing their pay and/or bonuses" and subjecting them to liquidated damages provisions if they breached).

⁴¹ For example, "the Eleventh Circui[t] [has a] long-standing approach that settlements in Fair Labor Standards Act (FLSA) litigation should not involve confidentiality because it contravenes congressional intent behind the law and undermines regulatory efforts and that FLSA settlement agreements must be filed in the court's public docket." Ronald L. Burdge, *Confidentiality in Settlement Agreements is Bad for Clients, Bad for Lawyers, Bad for*

“[t]he fact that people can use contracts [for] silence to keep important information from reaching the public explains why lawmakers should want to regulate these contracts.”⁴² But the fact remains that, more often than not, courts are reluctant to disturb a bargained-for agreement. Therefore, it is critical to begin this Part by acknowledging that invalidating contracts for silence involves swimming upstream. Nevertheless, in this Part, I identify and evaluate the strongest contract law arguments against contracts for silence, focusing primarily on how to best assert public policy defenses to enforcement.

Parties agree to contracts for silence in a variety of contexts. Sometimes, parties are motivated to enter into contracts for silence by economic interests⁴³—including worries that, should a particular piece of information become public, another party to the agreement would suffer financial consequences.⁴⁴ Parties also contract for silence in the context of settlement agreements designed to insulate a tortfeasor from civil liability by “hushing” the party who could stand to gain by making that information public.⁴⁵ Both varieties of contracts for silence⁴⁶ have generally been

Justice, AM. BAR ASS'N (Sept. 26, 2018), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/ [<https://perma.cc/483B-MGR4>] (citations omitted). Other courts have also invalidated confidentiality provisions in court-reviewed FLSA settlements as contrary to public policy. *See, e.g.*, *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 177 (S.D.N.Y. 2015) (invalidating confidentiality provisions of an employment agreement as “in strong tension with the remedial purposes of the FLSA”).

⁴² Garfield, *supra* note 2, at 275.

⁴³ *See id.* at 266 (“[C]ontracts [for] silence have also long been used in commercial circles to protect companies from the disclosure of valuable economic information such as trade secrets.”).

⁴⁴ *Id.* at 269. While this example invites readers to think about corporate and individual tort victims, contracts for silence are also *de rigeur* in the context of trade secret protection. For more, see ARTHUR H. SEIDEL & DAVID R. CRICHTON, *WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADE SECRETS AND EMPLOYMENT AGREEMENTS* 12 (3d ed. 1995) (“A trade secret is misappropriated only when there is a wrongful taking, use, or disclosure of another’s trade secret. Generally, a wrongful taking, use, or disclosure arises from a breach of a confidential or fiduciary relationship or a violation of the norms of business conduct through theft or espionage.”).

⁴⁵ *See, e.g.*, Luban, *supra* note 25, at 2650 (“Among the products whose defects are alleged to have been hidden by protective orders or sealed settlements are Dow Corning’s silicone gel breast implants; pickup trucks made by Ford and General Motors; Upjohn’s sleeping pill Halcion; Pfizer’s Bjork-Shiley heart valves; and McNeil Pharmaceutical’s painkiller, Zomax.”).

⁴⁶ The examples contained in this paragraph provide sufficient background on the scope and use of contracts for silence. Other uses are, of course, possible. For instance, contracts for silence can be incorporated into agreements protecting the reputation of celebrities in prenuptial agreements or protecting secret sources in journalism. *See generally* Garfield, *supra* note 2, at 272 (explaining how such agreements can “protect privacy and reputational interests”); *see also* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (dealing with a journalist’s source for inside political information who insisted upon

considered win–win solutions for the parties involved.⁴⁷

To be valid contracts, these agreements have to meet certain threshold requirements—for instance, the agreements must constitute bargained-for exchanges⁴⁸ between at least two parties, supported by consideration.⁴⁹ Well-lawyered parties likely will not have trouble satisfying this contract formation requirement or showing that the agreement resulted from a valid offer and acceptance of the contract terms.⁵⁰ While courts may sometimes invalidate contracts between private parties for fear that a reasonable person would not have intended the agreement to have legal force, such a ruling is harder to imagine in the context of an agreement where one party is a state actor.⁵¹ Who would imagine a contract with a government actor not to be binding, after all? Indefiniteness of contract terms might provide another route for courts to invalidate a contract for silence, though such an approach might require creative decision-making on the part of judges.⁵²

A substantive doctrine of contract law that may provide some assistance here is unconscionability.⁵³ “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁵⁴ As a doctrine, unconscionability is perhaps most relevant to adhesion contracts, i.e., “form contract[s] provided by a

confidentiality protections enshrined in contract); *Huggins v. Povich*, No. 131164/94, 1996 WL 515498 (N.Y. Sup. Ct. Apr. 19 1996) (addressing litigation concerns related to such a celebrity postnuptial agreement).

⁴⁷ *Cf.* Garfield, *supra* note 2, at 266 (describing why this system is untenable in certain situations where public access to that information is critically important for one reason or another).

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

⁴⁹ *See generally id.* §§ 71–94 (explaining the contractual requirement of consideration).

⁵⁰ “Problems of contract formation are more common when contracts [for] silence are created informally, particularly if they are oral.” Garfield, *supra* note 2, at 277.

⁵¹ *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 21 cmt. c (“In some situations the normal understanding is that no legal obligation arises . . .”).

⁵² I say this because the sophisticated parties drafting contracts for silence are probably unlikely to leave the meaning of key contract terms ambiguous, which would force courts to construe such terms extremely narrowly and make the task of invalidating the contract more difficult. However, courts would find support for this task in the Restatement—which urges courts to construe contract terms in the light most favorable to the public interest. *See id.* § 207 (“In choosing among reasonable meanings of a promise or agreement[,] . . . a meaning that serves the public interest is generally preferred.”).

⁵³ Garfield describes one additional approach which I do not explore here: the construction of § 557 of the First Restatement of Contracts, which he contends could rehabilitate the notion “that parties should not use contracts to suppress information of public interest.” Garfield, *supra* note 2, at 287. Since § 557 has only been referenced twice in judicial decisions since 1932, I see it as unlikely to offer meaningful support. *Id.* at 288.

⁵⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

party with significantly greater bargaining power” than another.⁵⁵ Yet, unconscionability may not be as suited doctrinally to policing contracts for silence since it focuses exclusively on the parties to the agreement and not on the costs borne by third-parties. Since contracts for silence are most problematic when they chill speech that might otherwise invigorate public debate, unconscionability doesn’t feel like the right doctrinal hook for this argument: applying it to the facts of a conventional contracts for silence case would involve fitting a square peg into a round hole, so to speak.

A more appropriate doctrinal hook for this argument is the public policy doctrine, which operates as a defense to the enforcement of contracts rather than as an *ex ante* bar on contracting. The doctrine boils down to the truism that, “[w]hile freedom of contract might exist, there is no freedom to use contracts to undermine important societal values.”⁵⁶ A public policy defense is available to parties in litigation when “the interest in [a term’s] enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”⁵⁷ Courts routinely look to duly enacted legislation as manifestations of a jurisdiction’s public policy judgments, though most of the time, as with contracts for silence implicating free speech values, there is no legislation on point.⁵⁸ While this balancing test for enforcing a public policy test seems intuitive, it in fact “masks the difficulties that courts encounter in trying to apply it.”⁵⁹ And balancing test aside, the bar remains quite high.⁶⁰

A. Public Policy as a Defense to Enforcement

Arguing for a public policy defense against enforcing for silence poses unique challenges and opportunities. Unfortunately, studying the impact of contracts for silence on the parties involved is made more difficult by the fact that most are never the subject of litigation or, if they are, involve sealed settlement agreements. On one hand, the strongest data-driven arguments for invoking the public policy defense to enforcement are likely case- and fact-specific.⁶¹ On the other hand, contracts for silence by state

⁵⁵ Garfield, *supra* note 2, at 285.

⁵⁶ *Id.* at 294.

⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 178.

⁵⁸ *Id.* § 178, cmt. a.

⁵⁹ Garfield, *supra* note 2, at 314.

⁶⁰ For instance, in Pennsylvania, “[a] contract, to be against public policy, must have a tendency to injure the public or to be against the public good, or must be inconsistent with good morals as to the consideration or the thing to be done.” *In re Book’s Estate*, 147 A. 608, 609 (Pa. 1929).

⁶¹ A couple of hypothetical cases serve to illustrate this point. What about the cases of tort plaintiffs who expose government wrongdoing, especially with regard to construction or

actors implicate hotly contested questions of whether and how parties should be allowed to settle⁶² and whether, at an abstract level, “silence [is] something that a party should be able to trade lawfully in a contract exchange”⁶³ That the rights protected by the First Amendment “are arguably so fundamental to the functioning of a democratic society” is also a strong argument in favor of such a public policy defense.⁶⁴ Plus, the fact that a well-functioning array of existing statutes controls the flow of information related to national security suggests that contracts for silence may be overkill—or at the very least created with motives other than safeguarding military interests.⁶⁵ In the following Sections, I sketch potential avenues for motivated parties to explore when launching their own challenges to contracts for silence, grounded in the public policy doctrine.⁶⁶

B. Public Policy & Case Law

The public policy interests embodied in the landmark *New York Times v. Sullivan* case lend some context to this worry that silencing—or chilling—criticism of public officials undermines the purpose of the First Amendment’s Free Speech Clause. Indeed, the Court relied on first principles in that 1964 case to hold that public officials could not bring libel suits against private

other services where the hazard could harm others (i.e. faulty bridge work)? And what about patterns of sexual harassment by public employees directed at members of the public and concealed by contracts for silence?

⁶² Compare Fiss, *supra* note 25, at 1076, and Luban, *supra* note 25, at 2621, with Miller, *supra* note 25, at 464.

⁶³ Garfield, *supra* note 2, at 294.

⁶⁴ G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 516 (1993).

⁶⁵ For instance, The Freedom of Information Act, 5 U.S.C. §552 (2018); Federal Advisory Committee Act, 5 U.S.C. App. 2 §1 (2018); Government in the Sunshine Act, 5 U.S.C. §552b(b) (2018); Presidential Records Act, 44 U.S.C. §2201–2207 (2018); and the Federal Records Act, 44 U.S.C. §3101–3107 (2018). In addition, for an example of how the Obama Administration envisioned government transparency functioning, see, e.g., Exec. Order No. 13,526, 75 Fed. Reg. 13526 (Dec. 29, 2009) (establishing a framework for the governance of sensitive government information—including declassification—on the grounds that, “[o]ur democratic principles require that the American people be informed of the activities of their Government”).

⁶⁶ Accord Garfield, *supra* note 2, at 266 (recommending that “courts deny enforcement to [contracts of silence] when the public interest in access to the suppressed information outweighs any legitimate interest in contract enforcement”). For another thoughtful analysis of the public policy doctrine in the context of contracts for silence, see generally David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (arguing that individuals who sign non-disclosure agreements following incidents of sexual misconduct should be able to invoke a public policy defense to the enforcement of those agreements against them in court).

citizen critics of their official conduct absent a showing of actual malice.⁶⁷ For the *Sullivan* Court, the most important function of the First Amendment is to preserve the ability of private citizens to engage in open dialogue about issues of public concern, even when that dialogue includes unwelcome (or even unfriendly) critiques of public servants.⁶⁸ While acknowledging the trade-offs inherent in such a permissive system, the Court accepted the wisdom of the Founders in creating strong free speech protections, writing, “The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’”⁶⁹ Against this backdrop, the abiding focus of the *Sullivan* Court was that the law could be construed to silence citizen speech that was necessary for a robust, full debate on the issues the advertisement at issue explored.⁷⁰ This insight is particularly relevant to the question of contemporary contracts for silence.

Constitutional law and politics scholar Mark Graber concurs. He takes the approach that “the public policy exception in contract law” for these situations “only makes sense in light of the public policy expressed by the First Amendment or the Constitution.”⁷¹ Otherwise, “in a dictatorship that recognized contract law, the ruling figures would have a right to buy up critical or damaging speech.”⁷² Graber also makes the point that, for the holding in *Sullivan* to mean anything, contracts for silence with public officials must be unenforceable: “If the Constitution prohibits state tort laws from sanctioning negligently false statements about public officials or

⁶⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁶⁸ *See, e.g., id.* at 269 (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931))).

⁶⁹ *Id.* at 270 (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

⁷⁰ For more, review the Court’s discussion of Justice Brandeis’s famous concurrence in *Whitney v. California*: “Believing in the power of reason as applied through public discussion, [“those who won our independence”] eschewed silence coerced by law—the argument of force in its worst form.” *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

⁷¹ Mark Graber, *Stormy Daniels and New York Times Co. v. Sullivan*, BALKINIZATION (Mar. 17, 2018), <https://balkin.blogspot.com/2018/03/stormy-daniels-and-new-york-times-co-v.html> [https://perma.cc/6WXE-C3QN]; *cf.* Jack M. Balkin, *Stormy Daniels and Cambridge Analytica*, BALKINIZATION (Mar. 18, 2018), <https://balkin.blogspot.com/2018/03/stormy-daniels-and-cambridge-analytica.html> [https://perma.cc/U2T9-3RYM] (explaining that Stormy Daniels’s “best argument sounds in contract law,” not in First Amendment law under the void for public policy doctrine espoused by Graber). Balkin’s response is not particularly germane to this paper, however, since he spends most of his time thinking about the ability of private actors like Facebook to enforce nondisclosure agreements.

⁷² Graber, *supra* note 71.

candidates for public office [as it did in *Sullivan*], then the same First Amendment plainly prohibits state contract law from sanctioning true statements about public officials and candidates for public office.”⁷³ By that logic, we should not allow public officials (and candidates for elected office) to contract around the limits *Sullivan* places on state actors’ abilities to enforce state libel law against private citizens.⁷⁴

C. Public Policy & Administrative Adjudications

As of yet, contracts for silence are an under-litigated topic in federal courts. Determinations by administrative law judges are, however, filling the gap. In the absence of legislative action, agencies are developing their own record, which would support a court in holding such an agreement unenforceable on public policy grounds. One such adjudication is *Aurore C. v. McDonald*. In that matter, the Equal Employment Opportunity Commission (EEOC) scrutinized a settlement agreement reached between the Department of Veterans Affairs and a former nurse in a Seattle, Washington care facility.⁷⁵ First, the EEOC invalidated on public policy grounds a provision stipulating that the complainant “[w]aive[d] future and unknown disputes in any forum,” reasoning that “[i]t is axiomatic that parties can only resolve actual existing disputes.”⁷⁶ Second, the EEOC eyed the agreement’s particularly broad nondisparagement provision, which read: “It should be understood that Complainant shall be prohibited from making any complaints or negative comments to any member of Congress or their staff, or any newspapers or media . . . or any other public forums, about the facts of this Settlement Agreement or the facts or conditions that led up to this Settlement Agreement.”⁷⁷ The EEOC held this provision void as “an unlawful, overly restrictive confidentiality limitation” that infringed upon “her First Amendment rights.”⁷⁸ The Commission severed these two provisions and let the remainder of the agreement stand.⁷⁹ *Aurore* suggests that at least in some corners, the public’s interest in transparency may outweigh an individual party’s interest in silencing inconvenient speech.

⁷³ *Id.*

⁷⁴ *See id.* (“Public officials and candidates for office should no more be able to suppress criticism of their behavior through nondisclosure agreements than they are through libel laws.”).

⁷⁵ EEOC Decision No. 0120150961, 2016 WL 1622532 (E.E.O.C. Apr. 14, 2016).

⁷⁶ *Id.* at *4–5.

⁷⁷ *Id.* at *2.

⁷⁸ *Id.* at *5.

⁷⁹ *Id.*

D. Some Objections

While this argument against the enforcement of contracts for silence is doctrinally sound, courts may not find it feasible to implement. For one, advocating for the use of public policy defenses to contract enforcement necessarily requires drawing a line in the sand and articulating not only the public costs of enforcing such an agreement, but also the countervailing values which favor voiding it. Any legal doctrine requiring such absolutist reasoning invites suggestions that the advocate overstates his case.⁸⁰ While there are significant consequences to the secrecy interests served by contracts for silence,⁸¹ such critiques are impossible to escape—indeed, they are a feature, not a bug, of this area of law.

Another objection to this approach rests on the alleged ephemeral nature of public policy defenses. By this account, public policy as a doctrine has no limiting principle, inviting abuse.⁸² These worries may be overstated, though. As David Hoffman and I explained elsewhere, “[p]ublic policy . . . is merely a contractual shield, not a sword, and can only be used by those internal to the contractual relationship.”⁸³ Other limits further cabin the reach of public policy defenses. As opposed to a legislative solution, public policy defenses “are adopted by common law courts in a step-wide, slow, and accretive manner.”⁸⁴ The benefits of this approach are clear: “If one court goes too far[,] . . . the next court considering such an agreement can choose again.”⁸⁵ Plus, the doctrine has a media-friendly posture; it’s relatively easily understood and sends a clear message to the public about the “social meaning of [these] legal agreements.”⁸⁶

It is worth adding that advancing this contract law argument against the enforceability of contracts for silence would serve yet one additional

⁸⁰ See 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §1375 (1962) (“The loudest and most confident assertions as to what makes for the general welfare and happiness of mankind are made by the demagogue and the ignoramus.”).

⁸¹ See, e.g., Hoffman & Lampmann, *supra* note 66, at 198 (2019) (“[S]ecrecy creates a unique set of problems when it is attached to the settlement of legal rights that have collective attributes.”).

⁸² The epitome of this critique is an oft-cited line from a British case, “[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you.” *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303.

⁸³ Hoffman & Lampmann, *supra* note 66, at 200.

⁸⁴ *Id.* at 201–02.

⁸⁵ *Id.* at 202.

⁸⁶ *Id.* at 205. For more on the expressive significance of law, generally, and contract law, specifically, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (exploring the messages communicated by law and the relation of law to shifting social mores).

interest: that of rehabilitating contract law and letting it speak on matters of social, political, and economic importance.⁸⁷ At the same time, making only this contract law argument would foreclose the First Amendment approach to contracts for silence, an approach which might resonate at a different and deeper level with everyday Americans.⁸⁸

III. THE FIRST AMENDMENT LAW ARGUMENT

The First Amendment dimensions of contracts for silence stem from an underlying belief—a civic commitment—that state-sponsored secrecy corrupts democratic governments.⁸⁹ In the context of contracts for silence, where parties enter into binding agreements with others to relinquish their right to uninhibited speech, this civic commitment is potentially threatened. In this Part, I contemplate two genres of legal claims against President Trump stemming from his use of contracts for silence: (1) government employees facing NDA enforcement actions for disclosing nonclassified information; as well as (2) former campaign staff facing enforcement actions initiated by current public officials for alleged violations of NDAs that pre-dated their government service. In doing so, I locate government contracts for silence within First Amendment jurisprudence concerning speech protections available to government employees. I further contend that current or former employees of the President are more likely to successfully defend against an enforcement action if their claims fall into the first category rather than the second.

A. Defenses Available to Current or Former Administration Employees

In this Section, I explore several lines of Supreme Court cases supporting public employees' Free Speech rights. While the Court has chipped away at the unrestrained right of government employees to speak on

⁸⁷ Cf. *supra* Part I (explaining that contemporary contract law deals far more with arbitration provisions and standard-form agreements than these sort of loftier ideals). For more on how contracts for silence “hush” contract law itself, see Hoffman & Lampmann, *supra* note 66, at 220.

⁸⁸ Garfield focused his analyses on contract law arguments to the detriment of his First Amendment analysis. Maybe this consideration failed to sway him. See, e.g., Garfield, *supra* note 2, at 267 (identifying the state action and waiver doctrines as important but unclear considerations for those seeking to defend against enforcement actions for contracts for silence).

⁸⁹ JEREMY BENTHAM, *An Essay in Political Tactics, or Inquiries Concerning the Discipline and Mode of Proceeding Proper to Be Observed in Political Assemblies: Principally Applied to the Practice of the British Parliament, and to the Constitution and Situation of the National Assembly of France*, in 2 WORKS OF JEREMY BENTHAM 298, 315 (John Bowring ed., 1838–43) (“Secresy is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government.”).

matters of public importance over the years, this doctrine remains a reliable way for employees, in their personal capacities, to engage in civic discussions. In the context of contracts for silence, these cases stand for the proposition that restrictions on the speech of government employees must bear some relation to the positions they occupy; under this doctrine, firing from the hip and silencing *all* government employee speech must be illegal.

The seminal case in this area of law is *Pickering*. There, the Court came to the defense of an Illinois teacher, fired for publishing a newspaper opinion piece opposing a proposed tax increase that his employer, the local Board of Education, supported.⁹⁰ The Board justified its decision to terminate the teacher by characterizing his piece as “detrimental to the efficient operation and administration of the schools of the district.”⁹¹ The Court saw things differently, emphasizing that the tax increase was “a matter of legitimate public concern” and that “[o]n such a question free and open debate is vital to informed decision-making by the electorate.”⁹² Especially because teachers are “most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent,” the Court held that their voices were particularly valuable to the public debate and that they should be permitted to engage in that debate without “fear of retaliatory dismissal.”⁹³

The Court then took the opportunity presented by *Pickering*’s fact pattern to pronounce upon broader First Amendment values. First, the Court re-emphasized “[t]he public interest in having free and unhindered debate on matters of public importance” as “the core value of the Free Speech Clause of the First Amendment.”⁹⁴ Second, the Court explained that, under recent case law, if the opinion piece in question was penned by a private citizen who wasn’t employed by the School District, the Board would have no “legal right to sue” the author, absent a showing that the statements ran afoul of the standard set out in *New York Times v. Sullivan*.⁹⁵ Since the teacher had no close working relationship with the

⁹⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

⁹¹ *Id.*

⁹² *Id.* at 571–72.

⁹³ *Id.* at 572.

⁹⁴ *Id.* at 573.

⁹⁵ The standard set out in *New York Times v. Sullivan* allowed public officials to seek recovery from members of the general public who allegedly defamed them only when the officials can put on proof that the speech contained “statements . . . shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity.” *Id.*

Board and didn't handle tax matters on a day-to-day basis,⁹⁶ the Court read his opinion piece as an attempt to speak as a member of the general public on a critical issue, which entitled him to free speech rights.⁹⁷ *Pickering* has come to stand for the proposition that public employees *do* have a constitutional right to speak on matters of public concern without fear of retaliation, so long as they don't make knowingly or recklessly false statements.⁹⁸

Fifteen years later, in *Connick v. Myers*, the Court revisited the question of how far public employees' First Amendment rights extend when speaking on matters of public concern. *Connick* dealt with the termination of a New Orleans Assistant District Attorney who refused a transfer to another section of the District Attorney's Office and who, in an alleged act of "mini-insurrection,"⁹⁹ circulated a workplace questionnaire to colleagues.¹⁰⁰ In that case, the Court restated the holding of *Pickering* and emphasized the importance of "seek[ing] a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁰¹ But unlike the *Pickering* Court, the majority in *Connick* determined this balancing test benefitted the District Attorney's Office and not petitioner.¹⁰² Core to this determination was the Court's judgment that the staffing conditions addressed via petitioner's questionnaire did not constitute "a matter of public concern."¹⁰³ For that reason, the local government deserved "wide latitude in managing their offices, without

⁹⁶ Earlier in the opinion, the Court observed that the teacher's "employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. The Court alluded to that observation when concluding on the extent of petitioner's First Amendment rights, writing that in *Pickering*, "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication," suggesting the rule they laid out ought not be read as categorical. *Id.* at 574.

⁹⁷ *Id.* at 574.

⁹⁸ *Id.* at 574–75.

⁹⁹ *Connick v. Myers*, 461 U.S. 138, 141 (1983).

¹⁰⁰ *Id.* at 140–41. The questionnaire sought to gauge employees' thoughts on a variety of subjects, including the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.*

¹⁰¹ *Id.* at 142 (internal quotation marks omitted).

¹⁰² *Id.*

¹⁰³ To be fair, the Court conceded that one of petitioner's questions did seem to touch on a matter of public concern (the question concerning political campaigns) but that when evaluated holistically, that question did not outweigh the questions which failed to touch on public concerns. *Id.* at 146–47.

intrusive oversight by the judiciary in the name of the First Amendment.”¹⁰⁴ *Connick* can therefore be read as distinguishing *Pickering*—especially when a public employee speaks on internal employment matters—and triggering a balancing test in all other instances where a public interest is potentially implicated.¹⁰⁵

It took over twenty years for the Court to revisit and amend the *Connick* approach. In a 2006 case, *Garcetti v. Ceballos*, the Court substantially cabined the First Amendment rights of public employees as recognized in *Connick* and *Pickering*, holding that, “when public employees make statements pursuant to their official duties,” they “are not speaking as citizens for First Amendment purposes” and no First Amendment rights are implicated.¹⁰⁶ Aware that some would accuse it of collapsing the *Pickering* framework in on itself, the Court countered by suggesting (perhaps implausibly) that public employees did not lose rights because of the holding in *Garcetti*.¹⁰⁷ From the majority’s perspective, “[r]efusing to recognize First Amendment claims based on government employees’ work product does not prevent them from participating in public debate.”¹⁰⁸ By this logic, while public employees can, of course, engage in public debate as citizens, that does not mean they can “perform their jobs however they see fit.”¹⁰⁹ After *Garcetti*, therefore, only public employees making statements outside of their official duties that touch on matters of public concern are entitled to the judicial balancing test under *Pickering* and its progeny.¹¹⁰

The Court clarified the first prong of *Garcetti*’s two-step inquiry in a 2014 related case, *Lane v. Franks*.¹¹¹ There, a public employee, Lane, alleged that his former employer retaliated against him for offering testimony in a coworker’s public corruption trial by firing him in violation of his First Amendment rights.¹¹² The Court was asked to consider “whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.”¹¹³ At trial, the district court relied on *Garcetti* to hold that, since “Lane had learned of the information that he testified about while working [for the state],” his

¹⁰⁴ *Id.* at 146.

¹⁰⁵ *Id.* at 140.

¹⁰⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹⁰⁷ *Id.* at 422.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 421.

¹¹¹ *Lane v. Franks*, 573 U.S. 228 (2014).

¹¹² *Id.* at 232-34.

¹¹³ *Id.* at 231.

speech fell within his “official job duties” and was not subject to First Amendment protection.¹¹⁴

In a uniquely straightforward opinion, the Supreme Court rejected that analysis, holding that Lane’s speech was not only protected by the First Amendment, but also that it was a “quintessential example” of the type of speech the Founders envisioned protecting under the Free Speech Clause.¹¹⁵ To Justice Sotomayor, it mattered that Lane divulged the information in a judicial proceeding. She elaborated, writing, “Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”¹¹⁶ Relying on this justification, the Court clarified the *Garcetti* test, adding that the crucial question in such analyses “is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”¹¹⁷ *Lane* therefore provides a helpful coda to *Garcetti* both by developing the concept of a “matter of public concern” and by insisting that the context of speech is relevant to any judicial inquiry under the First Amendment.

1. Protections for Public Employee Speech on Matters of Public Concern

Determining whether or not public employee speech falls “within the protected category of citizen commentary on matters of public concern” remains a difficult inquiry, however. Lower court opinions, as well as subsequent Supreme Court decisions, help clarify the contours of this category but stop short of providing bright-line rules. For the purpose of my analysis, these opinions include cases dealing with two aspects of government speech: its audience and its content.

Recent case law has placed some significance on the right of third parties to *hear* what public employees have to say. For instance, in *Harman v. City of New York*, the Second Circuit held that a city agency could not require its employees to seek permission before speaking to the press.¹¹⁸ The court clarified that the City would have needed to demonstrate “actual harm justifying such a broad restriction on the ability of employees to comment on the workings of the city agencies” for the regulation to pass muster.¹¹⁹ The regulation was struck down, because the City failed to make such a showing

¹¹⁴ *Id.* at 234–35 (internal quotation marks omitted).

¹¹⁵ *Id.* at 238.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 240.

¹¹⁸ *Harman v. City of New York*, 140 F.3d 111 (1998).

¹¹⁹ *Id.* at 115.

and because restraining public employees' speech "also imposes a significant burden on the public's right to read and hear what the employees would have otherwise written and said".¹²⁰ *Harman* was arguably a narrow ruling, however; it turned on the ability of television news viewers to *hear* what a government employee had to say. As the Seventh Circuit clarified in *Wernsing v. Thompson*, the calculus changes, then, when the matters concerned are entirely internal to a government workplace.¹²¹

The content of the speech is also critical, particularly when the topic of the employee's speech is related, even indirectly, to the employee's professional obligations. For instance, in *Lane*, Justice Sotomayor observed that the plaintiff's testimony on the topic of "corruption in a public program and misuse of state funds" was "obviously" a matter of public concern and that the context of the speech (sworn judicial testimony) bolstered that conclusion.¹²² The Supreme Court has since clarified, however, that the threshold for making meaningful citizen commentary on matters of public concern is not as low a bar as potentially suggested by Justice Sotomayor. For instance, making statements while clothed (either literally in a government uniform, or metaphorically) in the indicia of government affiliation isn't enough to trigger protection under the First Amendment.¹²³

Lower courts have also stepped into the gap and attempted to shore up the meaning of "public concern," sometimes protecting the employee and sometimes siding with her employer. For instance, the Ninth Circuit, has held as a general principle that "the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere potential disturbance to the workplace."¹²⁴ The Ninth Circuit has also ruled that a police regulation preventing officers from discussing any and all elements of a K9

¹²⁰ *Id.* at 119 (citation omitted).

¹²¹ See *Wernsing v. Thompson*, 423 F.3d 732, 754 (2007) ("Internal communications regarding office personnel policies, which allege no malfeasance or wrongdoing, simply are not the stuff of protected speech. Accordingly, Wernsing's inquiry does not constitute speech on a matter of public concern.").

¹²² *Lane*, 573 U.S. at 241.

¹²³ See generally *City of San Diego, Cal., v. Roe*, 543 U.S. 77 (2004). The Court explained that in the context of a police officer who alleged he was fired for First Amendment-protected speech in connection with a sexualized eBay store,

The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professional of its officers into serious disrepute.

Id. at 81.

¹²⁴ *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (internal citation omitted).

program with the public violated an officer's First Amendment rights because it was too broad and not narrowly drawn to avoid unnecessary disturbance to the force.¹²⁵

Taken together, these data points suggest that a lawsuit challenging the Trump Administration's contracts for silence with current White House employees would stand a good chance of success. For one, the NDAs leaked from the White House are extremely broad, covering nearly every utterance made by current and former employees. The agreements do not appear to discriminate between potential hearers or between different types of information (classified v. nonclassified; sensitive v. mundane). Employees hushed by the Administration's contracts for silence likely have the best chance of defending enforcement actions if they can paint their public speech (or written exposés) as commenting on potential corruption within the executive branch. As both *Lane* and *Robinson* make clear, public debate over, and scrutiny of, government officials' behavior—their stewardship of the collective trust—is of critical public importance. Yet even if public corruption were not raised directly in the speech at issue, litigants would have strong arguments that the Trump NDAs in their current form impermissibly chill citizen speech.

2. Permissible Restrictions on Public Employee Speech Concerning National Security

While “the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a ‘state interest of the highest order,’”¹²⁶ it is also the case that “[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure.”¹²⁷ In the context of this Comment, these special duties complicate the analysis. After all, if governments are able to bind public officials to silence—and those employees are the subject of many, if not most, contracts for silence—does not that render moot much of this argument? In fact, while a handful of government employees *are* subject to certain speech limitations when privy to information relevant to national security, they generally constitute a small minority of public officials. What's more, the record contains no apparent examples of government employees in non-intelligence or national security offices being held to such exacting silence standards. Charting the evolution of caselaw attempting to make sense of these dynamics may help clarify the rights of public officials to challenge contracts for silence.

¹²⁵ See generally *Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017).

¹²⁶ *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (citation omitted).

¹²⁷ *Id.* at 606.

The first such case is *Snepp v. United States*, where the Court held that government employees can be contractually barred from publishing not only *classified* but also *nonclassified* information without prepublication review.¹²⁸ In that case, the government sought and was granted enforcement of a nondisclosure agreement against Snepp, a former CIA intelligence officer, who “published a book about certain [agency] activities in South Vietnam” without first submitting it for prepublication review.¹²⁹ In its opinion, the Court minimized the importance of the distinction between classified and nonclassified information, instead recognizing the “vital national interests” jeopardized when individuals fail to follow prepublication review protocols, which can “impai[r] the CIA’s ability to perform its statutory duties.”¹³⁰ Since the Court was unwilling to challenge the CIA’s determination that even nonclassified information could be potentially damaging to the government’s security interests, it resolved the matter by pointing to Snepp’s breach of his trust relationship with the CIA and directed the proceeds of his book into government coffers.¹³¹

But it does not stop there. A year after *Snepp*, the Court affirmed its deference to the Executive when confronted with a case where covert intelligence interests butted up against free speech rights.¹³² In *Haig v. Agee*, the Court held the Secretary of State can lawfully revoke the passport of a U.S. citizen when that citizen’s speech imperils national security interests.¹³³ *Haig* dealt with a disaffected CIA officer’s “campaign to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating.”¹³⁴ The Secretary of State, provided with information about the officer’s activities, revoked his passport, justifying the revocation by pointing to the fact that his activities “[were] causing or [were] likely to cause serious damage to the national

¹²⁸ *Snepp v. United States*, 444 U.S. 507 (1980).

¹²⁹ *Id.* at 507.

¹³⁰ *Id.* at 512.

¹³¹ *Id.* at 511. The Court justified its determination that Snepp’s actions constituted a breach of trust by emphasizing his state of mind when deciding to forgo the prepublication review system, writing, “[Snepp] deliberately and surreptitiously violated his obligation to submit all material for prepublication review. Thus, he exposed classified information with which he had been entrusted to the risk of disclosure.” *Id.* at 511; *cf.* *U.S. v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) (holding that, within the Fourth Circuit, “[the First Amendment] precludes [restraints on publicity] with respect to information which is unclassified or officially disclosed”).

¹³² *Haig v. Agee*, 453 U.S. 280 (1981).

¹³³ *Id.* at 309–10.

¹³⁴ *Id.* at 283 (internal quotation marks omitted). The former CIA officer, Philip Agee, had his passport removed following a seven-year, worldwide effort to unmask covert CIA agents and informants, which led to “episodes of violence against the persons and organizations identified.” *Id.* at 285.

security or the foreign policy of the United States.”¹³⁵ The revocation also contained a notice advising the passport holder of his right to a post-revocation hearing.¹³⁶ The Court explained that, while the statute authorizing the government to issue passports did not explicitly contain provisions authorizing passport revocation, a combination of the “consistent administrative construction of that statute” to permit revocations and the uniquely compelling foreign policy and national interests at stake justified deference to the Secretary of State.¹³⁷ The Court also held that the Department of State’s notice of passport revocation and offer of a post-revocation hearing met the constitutional requirements of the Due Process Clause.¹³⁸

Haig was not without its critics. Justice Brennan, with whom Justice Marshall joined, dissented forcefully, worried that *Haig*’s First Amendment implications were deleterious to individual liberties.¹³⁹ The dissenters took issue with the majority’s reasoning that Defendant’s critiques of the CIA weren’t entitled to constitutional protections.¹⁴⁰ While they conceded that the facts of *Haig* were quite hard to overcome, Justices Brennan and Marshall nonetheless held firm in their belief that the content of the defendant’s speech was protected, however “unpopular” it might have been.¹⁴¹ While they pointed to administrative law rationales for why the Secretary of State might have overstepped his authority,¹⁴² they argued more persuasively that the precedent set by the *Haig* majority applied “not only to Philip Agee, whose activities could be perceived as harming the national security, but also to other citizens who may merely disagree with Government foreign policy and express their views.”¹⁴³

At first glance, it’s unlikely that members of the Trump Administration will successfully prevent current or former employees from disclosing nonclassified information so long as it does not trip the “sensitive information” wire in *Snepp*. There will certainly be edge cases where

¹³⁵ *Id.* at 286.

¹³⁶ *Id.* at 287.

¹³⁷ *Id.* at 290–92.

¹³⁸ *Id.* at 310. The Court observed that imposing an obligation on the Department of State to conduct a pre-revocation hearing when a “substantial likelihood” existed that defendants’ actions were causing “serious damage” to the national interest would effectively involve turning the Due Process Clause into a “suicide pact.” *Id.* at 309–10.

¹³⁹ *Id.* at 310 (Brennan, J., dissenting).

¹⁴⁰ *See id.* at 308–09 (majority opinion) (“Agee’s disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution.”).

¹⁴¹ *Id.* at 319 (Brennan, J., dissenting).

¹⁴² *Id.* at 317 (arguing that the “paucity of recorded administrative practice” with regard to passport revocations distinguished *Haig* from the precedential cases relied upon by the majority).

¹⁴³ *Id.* at 319.

information is plausibly related to national security and also plausibly mundane. Nevertheless, courts will not permit the President to deem *all* information shared with his employees as subject to national security secrecy provisions—especially since doing so might also come with efficiency losses as more and more information is subject to some form of classification. What *Snepp* and its progeny tell us, therefore, is that public employees seeking to avoid enforcement actions by the Trump White House would be well-advised to refrain from disseminating information closely related to the military, intelligence gathering, or national security, as it would substantially weaken their defense.

Nonetheless, the Trump Administration does appear willing to contest the dissemination of supposedly unclassified information in violation of NDAs, as evidenced by legal action taken in Fall 2019. In November, for instance, the Department of Justice (DOJ) Civil Division sought to halt publication of a book by an anonymous senior executive branch official¹⁴⁴ who previously drew President Trump's ire for publishing an opinion piece in *The New York Times*.¹⁴⁵ The DOJ asserted that, by publishing the book, the author "may violate [the] official's legal obligations under one or more [NDAs]."¹⁴⁶ The publishing house, Hachette, promptly refused to halt publication, defending their author and noting, "Hachette is not party to any nondisclosure agreements with the U.S. government that would require any prepublication review of this book, and Hachette routinely relies on its authors to comply with any contractual obligations they may have."¹⁴⁷ Importantly, DOJ lawyers did not file suit against Hachette at the time—nor

¹⁴⁴ Letter from Joseph H. Hunt, Assistant Att'y Gen., U.S. Dep't of Justice, to Carol F. Ross, Exec. Vice President, Hachette Book Grp., et al. (Nov. 4, 2019) (on file with author). For additional context, see John Mayer, *Hachette, Warned by DOJ, Moving Ahead With "A Warning,"* PUBLISHERS WKLY. (Nov. 4, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/81646-hachette-warned-by-doj-moving-ahead-with-a-warning.html> [<https://perma.cc/GSZ2-GS9H>].

¹⁴⁵ See Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/79M2-HCF9>] (describing the efforts of an organized group of administration officials to subvert President Trump's "misguided impulses").

¹⁴⁶ Letter from Joseph H. Hunt to Carol F. Ross et al., *supra* note 144, at 1. Recently, the President reassigned a political appointee from a national security role at the White House to the Department of Energy, leading some to comment that the individual may have been behind the anonymous opinion piece. Steve Holland, *Trump's Deputy National Security Adviser Victoria Coates Leaving White House*, Reuters (Feb. 20, 2020, 10:07 AM), <https://www.reuters.com/article/us-usa-trump-coates/trumps-deputy-national-security-adviser-victoria-coates-leaving-white-house-idUSKBN20E24R> [<https://perma.cc/7YK2-GXSW>].

¹⁴⁷ Letter from Carol F. Ross, Exec. Vice President, Hachette Book Grp., to Joseph H. Hunt, Assistant Att'y Gen., U.S. Dep't of Justice (Nov. 4, 2019) (on file with author).

have they as this Comment goes to print.¹⁴⁸ Whether the decision to refrain from doing so reflects an awareness of the potentially dubious strength of the Department's legal claims remains to be seen. What is clear is that, as NDAs and nondisparagement agreements continue to make news,¹⁴⁹ the stakes of these legal dramas become higher and higher.

3. An Objection—When Parties Waive Their Constitutional Rights

The Trump Administration nevertheless has strong counterarguments to raise against any current or former employee seeking to expose information the President would prefer to remain secret. In this Subsection, I will focus my attention on the strongest such argument: that the employees in question signed away their First Amendment rights and that doing so was entirely lawful. Current and former employees have reason to pause and carefully consider the likelihood of the Administration prevailing on this claim. After all, while waiver sounds in constitutional law, it draws its inspiration from contract law principles—namely, that courts ought to trust parties' stated intentions as memorialized in duly enacted written agreements. That the legal landscape surrounding the waiver of constitutional rights, specifically First Amendment rights, is difficult to parse only increases the likelihood that the Administration could persuade courts to adopt this easily applicable contract law approach. In this Subsection, I will chart the benefits and drawbacks of permitting individuals to waive their constitutional rights and explain how plaintiffs might respond to the arguments contemplated above.

¹⁴⁸ Cf. Complaint, *United States v. Snowden*, No. 1:19-cv-01197 (E.D. Va. Sept. 17, 2019) (initiating a civil breach of contract suit against Edward Snowden in response to his publication of a book without submitting the manuscript for prepublication review by the U.S. government as allegedly required by employment contracts he signed earlier in his career).

¹⁴⁹ To reference just one recent example, in October 2019, President Trump announced he intended to host the G-7 Summit at one of his Florida properties, only to face immediate criticism from ethics watchdogs. Courtney Bubl , *Ethics Officials Criticize Selection of Trump Resort for G-7 Summit*, GOV. EXEC. (Oct. 18, 2019), <https://www.govexec.com/oversight/2019/10/ethics-officials-criticize-selection-trump-resort-g-7-summit/160703/> [<https://perma.cc/FG4K-XH4S>]. Of particular concern was the fact that, should "the Trump Organization become[e] a government contractor, federal law could force the company to loosen its nondisclosure agreements." Walter Shaub, *Doral Hosting the G-7 Could Jeopardize Trump's Nondisclosure Agreement*, CREW (Oct. 16, 2019), <https://www.citizensforethics.org/doral-g7-jeopardize-trumps-nondisclosure-agreements/> [<https://perma.cc/7PSB-83FZ>]. Several days after the decision was first announced, however, the White House "abruptly reversed course," saying the summit would be held elsewhere. Katie Sullivan, *Trump Reserves Course and Says His Florida Resort Won't Be Used for G7 Summit*, CNN (Oct. 20, 2019, 1:13 PM), <https://www.cnn.com/2019/10/19/politics/trump-property-no-longer-considered-for-g7-summit/index.html> [<https://perma.cc/7KZE-YRGM>].

On its face, waiving constitutional rights is not always problematic. On the one hand, courts must allow parties to waive constitutional rights to ensure the continued functioning of our judicial system, particularly in criminal cases.¹⁵⁰ “Constitutional rights are waived every day. People incriminate themselves, surrender their rights to counsel, waive a bundle of rights as part of plea bargains, and sign contracts surrendering a right to trial through arbitration or confession of judgment clauses.”¹⁵¹ These efficiency gains are critically important, especially against the backdrop of a federal judiciary struggling under the burden of increasing filings. Plus, they save parties money: “[i]n terms of monetary costs, waivers allow people to reach informal agreements that avoid the expense of asserting their rights.”¹⁵² Lastly, “waivers frequently save time” by allowing parties to quickly resolve their disputes¹⁵³

On the other hand, waivers can be dangerous. “Waivers can be dangerous for precisely the same reason that they can be valuable: they constitute alternatives to the protections provided by the plenary assertion of one’s rights.”¹⁵⁴ Allowing individuals to “waive” their rights only makes sense when they do so consciously¹⁵⁵—and even then, certain rights are beyond the scope of the doctrine (e.g., the right to waive one’s Thirteenth Amendment rights).¹⁵⁶ Indeed, there is a collective sense that courts should more closely police the waiver of the core rights vested in each of us.¹⁵⁷ But even there, courts can get it wrong; by focusing their waiver analyses on the individual parties to an agreement—devoid of a broader context—they may fail to see the whole field, potentially permitting waiver in exactly those instances where individuals stand to lose the most.¹⁵⁸ Plus, waiver of First

¹⁵⁰ See, e.g., Michael E. Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970) (“It is waiver of rights that permits the system of criminal justice to work at all.”).

¹⁵¹ Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346.

¹⁵² Rubin, *supra* note 19, at 488.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1383 (1984) (“A doctrine respecting individual choices, however, requires that such choices should at least result from conscious choice.”).

¹⁵⁶ But, for some, refusing to allow waiver of 13th or 14th Amendment rights also raises the specter of paternalism. “There seems to be substantial support from both sides of the aisle for the view that the attempts to choose for another what that person ‘really wants’ in the name of freedom has a tendency to degenerate into totalitarianism.” *Id.* at 1388 n.346.

¹⁵⁷ See, e.g., *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (explaining that, when a “fundamental” right is at issue, “courts indulge every reasonable presumption against waiver”).

¹⁵⁸ See, e.g., Rubin, *supra* note 19, at 529 (“[A] theory of waiver should take account of the entire situation in which the waiver occurs. This is something that current rationales, by considering only the waiving party and ignoring the other participants in the transaction, fail to do.”).

Amendment rights is arguably distinguishable from waiver of constitutional rights in criminal proceedings. When you waive your right to a jury, you have a clear sense of what you're giving up; when you waive future rights of free expression, you don't yet know what opportunities you are trading away. This begs the question: is the waiver of constitutional rights appropriate in the context of President Trump's contracts for silence?

At first blush, it would seem plaintiffs have little leeway due to the enforcement-friendly waiver, especially since the Court has never had occasion to announce a legal standard for when individuals can waive their First Amendment rights.¹⁵⁹ In the absence of controlling precedent, circuit courts have generally mapped traditional waiver of constitutional rights standards onto the First Amendment.¹⁶⁰ The Ninth Circuit, for instance, "has established that contracts [for silence] can evidence knowing, voluntary, and intelligent waiver because parties have the ability to exchange rights in the bargaining process."¹⁶¹ On the margins, courts might also consider mitigating factors like whether the agreement was "reached through fraud, duress, or mutual mistake."¹⁶² They may also consider the relative strength of the parties involved, especially their financial resources.¹⁶³ The fact remains, however, that arguing about these factors is unlikely to vindicate the rights of the plaintiffs my Comment contemplates.

But much as the public policy doctrine sets the outer limits of the freedom of contract, the doctrine of alienability polices the appropriate use of constitutional waivers. While there are reasons to accept individuals' conscious decisions to waive constitutional rights in certain instances, we might also worry about the aggregate effect of such decisions over time, particularly in the context of contracts for silence.¹⁶⁴ For instance, arguably there are certain rights which are not an individual's to waive. This is how we reach alienability. A right is waivable, or alienable, when "the power not

¹⁵⁹ Brittany Scott, Note, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 HASTINGS CONST. L.Q. 451, 451 (2019).

¹⁶⁰ *Id.* at 455.

¹⁶¹ *Id.* at 459; *see also* Nat'l Abortion Fed'n v. Ctr. for Med. Progress, 685 Fed. App'x 623, 626 (9th Cir. 2017); *accord* Leonard v. Clark, 12 F.3d 885, 889 (9th Cir. 1993).

¹⁶² Rubin, *supra* note 19, at 513.

¹⁶³ As Rubin explains,

Where the party agreeing to the waiver is equal in economic strength to the other party, has openly discussed the waiver term, and has obtained some advantage in return for his agreement, the waiver will generally be enforced, where any of these conditions is absent, however, the waiver will be carefully scrutinized.

Id. at 523.

¹⁶⁴ *See, e.g.*, Kreimer, *supra* note 155, at 1391 ("Most importantly, the government may be barred from attempting to obtain waivers of constitutional rights because such attempts may constitute an unacceptable accumulation of power over the right in question.").

to exercise the right [is] transferable to another party in exchange for the proffered benefit.”¹⁶⁵ A right would be inalienable, however, when it was not possible for an individual to transfer their interest. The best argument in defense of the plaintiffs I contemplate would therefore be to emphasize the inalienability of their speech rights. They might argue, for instance, that allowing individuals to sell off their ability to speak on matters of public concern undermines our core democratic values—and that even if individuals can sign away their free speech rights to other private parties, purchasing citizen speech should always be off limits to the State.¹⁶⁶

B. Defenses Available to Former Private Sector Employees of the President

The argument that the President, by virtue of his current public office, should be restrained from enforcing contracts for silence against previous private-sector or campaign employees is harder to make out—no matter how you cut it.¹⁶⁷ On one hand, the above principles of democratic accountability counsel that the State should not be permitted to chill citizen speech on matters of public concern, especially when that information is not necessary to safeguard national security. On the other hand, these individuals willingly limited their free speech rights via contract before they knew the other party to their agreement would become President of the United States. In this Section, I explore the unique policy arguments for and against blocking the President's enforcement actions against such employees, while attempting to locate the strongest possible defenses available to such plaintiffs who square off against the President.

The best arguments in favor of forbidding enforcement actions by the President against former private-sector employees are grounded in democratic theory and in novel attempts to reconceptualize First Amendment

¹⁶⁵ *Id.* at 1386.

¹⁶⁶ *Id.* at 1391.

¹⁶⁷ For instance, a former campaign staffer named Jessica Denson has tried unsuccessfully to escape the arbitration clause in an NDA she signed with the Trump Campaign in her capacity as an employee. Denson “sued in federal court to void her NDA in order to pursue a separate state lawsuit in which she claim[ed] she was harassed and defamed by her superiors.” Bob Van Voris, *Former Trump Campaign Staffer Loses Case Over Nondisclosure*, BLOOMBERG (July 23, 2019, 7:03 PM), <https://www.bloomberg.com/news/articles/2019-07-23/former-trump-campaign-staffer-loses-case-over-non-disclosure> [<https://perma.cc/NRX4-FUVC>]. She lost in federal court, where S.D.N.Y. Judge Jesse M. Furman sent her dispute to arbitration. *Id.*; *Denson v. Donald J. Trump for President, Inc.*, No. 18-cv-2690, 2018 WL 4568430 (S.D.N.Y. Aug. 30, 2018). The arbiter subsequently awarded the Trump Campaign tens of thousands of dollars in fees. Van Voris, *supra*. Denson also tried unsuccessfully to vacate that arbitral award against her in a later state court case. *Denson v. Donald J. Trump for President, Inc.*, No. 0101616/2017, 2019 NYLJ LEXIS 958 (N.Y. Sup. Ct. Mar. 13, 2019).

jurisprudence. Scholarship by democratic theorists supports the proposition that secrecy undermines trust, transparency, and faith in government—particularly when that secrecy is engaged in conspiratorially and with the express purpose of hiding wrongdoing from view.¹⁶⁸ Commitments like these to government accountability are no longer outliers; international norms now reflect the idea that “[o]penness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies.”¹⁶⁹ So long as Americans tolerate state actors using contracts for silence to manipulate the scope of public debate—and oftentimes to chill the speech of the individuals best positioned to steer that debate—we are complicit in the corruption of those norms.

By inhibiting the free flow of information, government-enforced secrecy places constraints on “speech concerning public affairs,” which is itself “more than self-expression; it is the essence of self-government.”¹⁷⁰ Indeed, “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹⁷¹ Self-actualization through speech, debate, and engagement with the government is core to the American ideal and sustains our democratic project; it ensures “the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁷² In short, plaintiffs could potentially contend that contracts for silence undermine the Framers’ vision for free and open debate by making it harder or impossible for them to hold their former employer, now-President Trump, accountable.¹⁷³

¹⁶⁸ BENTHAM, *supra* note 89; see also Louis Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10, 10 (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

¹⁶⁹ Angel Gurria, *Openness and Transparency—Pillars for Democracy, Trust, and Progress*, OECD, <http://www.oecd.org/fr/etatsunis/opennessandtransparency-pillarsfordemocracystandprogress.htm> [<https://perma.cc/QEH7-M75J>] (last visited Feb. 27, 2019).

¹⁷⁰ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted).

¹⁷¹ *Turner Broadcasting Sys., Inc., v. FCC*, 512 U.S. 622, 641 (1994).

¹⁷² *Connick*, 461 U.S. at 145 (citation omitted).

¹⁷³ As Justice Brandeis wrote in his dissent in *Olmstead*,

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

An alternative approach for these plaintiffs would be to explain that the free exchange of ideas facilitated by the First Amendment “furthers intrinsic and instrumental values for speakers *and* listeners,” with a distinct emphasis on the latter.¹⁷⁴ A recent champion of this position is Burt Neuborne, former Legal Director of the American Civil Liberties Union. He has publicly advocated for such a position by arguing that courts ought to shift the focus of First Amendment scholarship away from the unquestioned primacy of the “speaker” and towards a “hearer”-centric model, especially in the context of contracts for silence.¹⁷⁵ Neuborne’s thesis is that “asserting a hearer’s ‘right to know’ as the counterweight to promises she hasn’t consented to may be the only plausible route to attacking NDAs . . . under federal law as violations of the First Amendment.”¹⁷⁶ Since “[t]he Court has recognized that respecting a hearer’s First Amendment interest in receiving information can pry important information out of unwilling speakers”—especially in the context of FOIA or consumer protection suits—adopting a hearer-centered approach to First Amendment advocacy might allow the Court to reach the sorts of edge cases like those contemplated in this section.¹⁷⁷

Neuborne is not alone in this position. David Cole has similarly argued for a hearer-centered approach to First Amendment jurisprudence, writing, “[w]hen the government funds speech . . . First Amendment concerns are not limited to potential coercion of the subsidized speaker.”¹⁷⁸ Instead, they “extend also, and perhaps more importantly, to the listener. From the perspective of the audience, the danger lies not in the coercive effect of the benefit on speaker, but in the indoctrinating effect of a monopolized marketplace of ideas.”¹⁷⁹ Applying Neuborne’s hypothesis to the genre of lawsuit contemplated here would require plaintiffs to describe in great detail the public’s interest in whatever information they wanted to reveal. To be successful, such disclosure would likely need to add important evidence to an ongoing public debate of the highest order.

Of course, an argument like Neuborne’s is not likely to suddenly carry the day. Additional research and factfinding would be required for it to take hold. In fact, recent caselaw suggests that the Court may be particularly averse to blocking NDA enforcement actions when the individuals seeking to disclose information only gained access to that information subsequent to

¹⁷⁴ *Johnson v. Fed. Express Corp.*, 147 F. Supp. 2d 1268, 1276 (M.D. Ala. 2001) (emphasis added).

¹⁷⁵ Neuborne, *supra* note 3, at 413.

¹⁷⁶ *Id.* at 438.

¹⁷⁷ *Id.* at 414.

¹⁷⁸ David Cole, *Beyond Unconstitutional Conditions: Chartering Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992).

¹⁷⁹ *Id.*

signing away their right to disclose it; such circumstances create “a powerful equitable basis . . . for enforcing the promise as a form of reliance,” as compared to a situation where an individual had access to certain information, signed an NDA, and then wanted to share that information so as to prevent third-party harm.¹⁸⁰ For these reasons, I find it hard to believe the courts would endorse such a novel approach to the First Amendment—at least while litigation stemming from Trump campaign malfeasance remains live.

CONCLUSION

NDAs and nondisparagement agreements are now common features of our contracting landscape. Their increased use by state actors, however, presents new challenges to safeguarding our core democratic values. In the absence of legislative action,¹⁸¹ the task of controlling the spread of contracts for silence by elected officials, like the President, falls to litigants. In this Article, I have provided hypothetical plaintiffs a roadmap as they aim to hold accountable elected officials who would use contracts for silence to chill the speech of those they have sworn to serve.

¹⁸⁰ See *Cohen v. Cowles Media*, 501 U.S. 663, 669–70 (1991) (permitting recovery under a promissory estoppel theory for a confidential source who, after having shared information with a newspaper on the condition of anonymity, had his identity revealed in breach of contract). Neuborne has suggested this distinction as “a basis for distinguishing *Snepp* and *Cowles Media* from situations like Stormy Daniels’s NDA, where her possession of the information she wishes to disseminate has nothing to do with her promise not to speak.” Neuborne, *supra* note 3, at 433.

¹⁸¹ Cf. *NDAs: New Laws to Crack Down on ‘Gagging’ Clauses*, BBC (July 21, 2019), <https://www.bbc.com/news/uk-49060456> [<https://perma.cc/JH7R-WVK2>] (describing legislative proposals in the United Kingdom which would “ban NDAs that stop people disclosing information to the police, doctors, or lawyers”).